No. 96-1229

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DARYL GATES, et al., all in both their individual and official capacities; and CITY OF LOS ANGELES,

Cross-Petitioners,

v.

JOHANNA TREVINO, a minor,

Cross-Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CITIES OF ALAMEDA, ANAHEIM, ATHERTON, ATWATER, BENICIA, BURBANK, BURLINGAME, CAPITOLA, CHULA VISTA, CORCORAN, COTATI, CULVER CITY, DINUBA, DIXON, EL CAJON, EUREKA, FULLERTON, GARDENA, GLENDALE, HAWAIIAN GARDENS, HAYWARD, HEMET, HUGHSON, HUNTINGTON BEACH, HURON, INDIAN WELLS, IRVINE, KING CITY, LAFAYETTE, LA HABRA, LAGUNA BEACH, LAKEWOOD, LANCASTER, LAWNDALE, LONG BEACH, LOS ALTOS, LYNWOOD, MALIBU, MERCED, MONTEREY, MOUNTAIN VIEW, NAPA, NEWPORT BEACH, OAKLAND, ONTARIO, ORANGE COVE, PALMDALE, PICO RIVERA, PITTSBURG, PLACENTIA, REDDING, REDLANDS, REDONDO BEACH, RIALTO, RIVERSIDE, SAN BRUNO, SAN JOSE, SAN PABLO, SAN RAFAEL, SANTA BARBARA, SANTA CLARA, SANTA PAULA, SANTA ROSA, SOLANA BEACH, SUNNYVALE, THOUSAND OAKS, TORRANCE, TULARE, VERNON, VISALIA, WALNUT, WEST COVINA, WEST SACRAMENTO, WHITTIER, TOWNS OF CORTE MADERA, LOS GATOS, ROSS and SAN ANSELMO IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When calculating attorney's fees to be awarded to prevailing plaintiffs pursuant to 42 U.S.C. § 1988 (1994), should district courts be precluded from considering evidence of the hourly rates paid to private attorneys employed by public entities to litigate and defend civil rights cases?

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BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, subdivision 4, by and through their authorized law officers, the Cities of Alameda, Anaheim, Atherton, Atwater, Benicia, Burbank, Burlingame, Capitola, Chula Vista, Corcoran, Cotati, Culver City, Dinuba, Dixon, El Cajon, Eureka, Fullerton, Gardena, Glendale, Hawaiian Gardens, Hayward, Hemet, Hughson, Huntington Beach, Huron, Indian Wells, Irvine, King City, Lafayette, La Habra, Laguna Beach, Lakewood, Lancaster, Lawndale, Long Beach, Los Altos, Lynwood, Malibu, Merced, Monterey, Mountain View, Napa, Newport Beach, Oakland, Ontario, Orange Cove, Palmdale, Pico Rivera, Pittsburg, Placentia, Redding, Redlands, Redondo Beach, Rialto, Riverside, San Bruno, San Jose, San Pablo, San Rafael, Santa Barbara, Santa Clara, Santa Paula, Santa Rosa, Solana Beach, Sunnyvale, Thousand Oaks, Torrance, Tulare, Vernon, Visalia, Walnut, West Covina, West Sacramento, Whittier, Towns of Corte Madera, Los Gatos, Ross and San Anselmo, political subdivisions of the State of California,[1] hereby respectfully request the Court to grant the cross-petition for writ of certiorari of cross-petitioners Daryl Gates, Tom Bradley, Herbert Broeckmann, Jerry Brooks, Joseph Callian, Michael Sirk, Richard Spelman, Gary Strickland, James Tippings, Richard Zierenberg, Manuel Avila, Charles Bennett, Brian Davis, John Fruge, Joseph Freia, Edward

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[1] *Illinois v. City of Milwaukee*, 406 U.S. 91, 97-98 (1972) (cities and counties are "political subdivisions" of states, and hence citizens of state for purposes of diversity jurisdiction, but as subdivisions of state are not subject to mandatory original jurisdiction of Supreme Court under 28 U.S.C. § 1251(a)).

Guzia, Peter Sanchez, Reginald Weaver, James Toma, C.S. Winston, Philip Wixon, Gary Zerbey, Joel Wachs, Joy Picus, John Ferraro, Zev Yaroslavsky, Ruth Galanter, Ernani Bernardi, Nate Holden, Marvin Braude, Hal Bernson, Michael Woo, Joan Flores, City of Los Angeles, and City of Los Angeles, in the above case. Amici are public entities in the State of California with a collective population of well over one million residents. The decision of the Ninth Circuit Court of Appeals in this case sharply limiting the evidence which may be considered by a district court in determining the market rate for attorney's fees awards under 42 U.S.C. § 1988 has a direct and substantial effect on these amici. In addition, the general principles of law addressed in the Ninth Circuit's opinion and that are presented for review to this Court concerning the parameters of any applicable "market" for purposes of arriving at a fee award under section 1988 are of substantial and continuing concern to these public entities, as well as public entities throughout the country. Therefore, these amici respectfully request the Court to grant the cross-petition for writ of certiorari to decide these important issues.

SUMMARY OF ARGUMENT

It is a reality of modern civil rights litigation that the greatest financial exposure public entities face is derived not from any potential damage award to a plaintiff, whose actual injury may be slight, or who may have obtained some manner of injunctive relief, but from the specter of an award of attorney's fees to the prevailing party under 42 U.S.C. § 1988. In a given case a plaintiff's

damages can, through medical examination, or economic analysis be evaluated for purposes of settlement or eventual trial, but evaluating potential exposure to an attorney fee award is much more problematic. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Court sought to define and limit such awards to "reasonable fees" which it described as "rates . . . in line with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n.11 (emphasis added). However, as the Court acknowledged, this definition was necessarily artificial and the "market rate" "inherently difficult" to determine. *Id.*

The result has unfortunately been a startling lack of consistency among the federal trial and appellate courts in their interpretation of what constitute "similar services" for purposes of considering or, as indicated in this case, rejecting specific types of evidence in attempting to define the relevant market rate and calculate a fee award under section 1988. Some courts have concluded that all litigation work is essentially similar so as to allow evidence of market rates charged for general litigation to be considered in determining the market rate for civil rights claims. Others have required a plaintiff (or in rebuttal a defendant) to present evidence of the market rate charged for litigating the specific civil rights claim in question. Still other courts have allowed evidence of market surveys encompassing rates charged for legal services in general without regard to whether such fees were charged for litigation or other legal work. While many courts will consider fee awards in similar cases as proof of the market rate, other courts discount the probative value of such evidence.

As indicated by the Ninth Circuit's decision in this case and that of the Eleventh Circuit in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993), at least two courts have held that the market for purposes of evaluating a fee award under section 1988 must be limited to what attorneys representing *plaintiffs* receive as an hourly rate. This is because attorneys who represent public entities in such litigation are not in the "same market" as the plaintiffs' attorneys. These decisions are based on the dubious premise that defense attorneys do not provide services similar to those of plaintiffs' attorneys, notwithstanding the fact that putting aside the differing goals each side has in a particular case, the attorneys in such actions perform essentially the same functions, conduct the same discovery and confront the same legal issues. Significantly, at least one other federal appellate court has recognized the inherent similarity in the services performed by defense attorneys and by plaintiffs' attorneys in civil rights litigation and has observed that absent special circumstances, in most cases there is no reason why the hourly rate paid to plaintiffs' lawyers should exceed that paid to defense lawyers. *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1190 (1st Cir. 1996).

Certiorari is clearly warranted in this case because the narrow definition of market rates embraced by the Ninth Circuit in *Trevino*, and the Eleventh Circuit in *Brooks*, inherently distorts and inflates the market rate for attorney's fees under section 1988 by excluding evidence of hourly rates paid by the single largest group of consumers of legal services on an hourly basis in the context of civil rights litigation – public entities. It will allow this Court to resolve a conflict between *Brooks* and *Trevino* and

the First Circuit's decision in *Andrade*. More critically, in addressing this important issue, the Court can further define and clarify what constitute "similar services" for purposes of determining the applicable market in arriving at a fee award under section 1988. Absent intervention by this Court, public entities and their taxpayer citizens will continue to confront a patchwork of decisional law which provides neither predictability nor rationality in the setting of fees awards. This, in turn, makes it virtually impossible for public entities to properly evaluate cases for possible settlement at an early stage and spawns the very sort of protracted fee litigation that this Court has sought to avoid.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING THE EVIDENCE USED TO ESTABLISH A MARKET RATE FOR PURPOSES OF CALCULATING A FEE AWARD UNDER 42 U.S.C. § 1988.

In its decision in this case, the Ninth Circuit embraced the Eleventh Circuit's reasoning in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993), and concluded that the hourly rate paid to private attorneys defending public entities in civil rights litigation is irrelevant in determining the prevailing market rate in the community for purposes of calculating a fee award under section 1988. Citing *Brooks*, the Ninth Circuit expressly held that such evidence was irrelevant because private defense counsel are ostensibly not in the same

"legal market" as attorneys who represent plaintiffs in such litigation. (Appendix to Petition for Certiorari ("App."), p. 27a.)

As noted in the cross-petition for certiorari, the position of the Ninth and Eleventh Circuits on this issue is in direct contravention to the views espoused by the First Circuit in *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179 (1st Cir. 1996). In addition, the narrow view of the applicable "market" embraced by the Ninth and Eleventh Circuits leads to an inherent distortion in the marketplace by removing from consideration the hourly fees paid by the single largest body of consumers of civil rights litigation services on an hourly basis – public entities. This, in turn, necessarily leads to inflation of the market rate eventually awarded, since evidence of what plaintiffs' attorneys charge and ostensibly receive for performing civil rights litigation services can, in most circumstances, be obtained only from attorneys who represent plaintiffs in such actions – the very beneficiaries of an inflated market rate.

The conflict between the Ninth and Eleventh Circuits and the First Circuit on this issue would in and of itself warrant certiorari. Moreover, because of the sheer size of the Ninth and Eleventh Circuits, the erroneous rule of law enunciated in *Trevino* and *Brooks* has a profound impact on a large number of public entities and their taxpayers who in the final analysis must pay for such inflated fee awards. Indeed, amici, which are confined to only 79 cities and towns within the State of California, have a collective population of well over one million, and that is only a fraction of the citizens within the jurisdiction of the Ninth Circuit that are directly affected by *Trevino*.

In addition, the narrow definition of market rate applied in *Trevino* and *Brooks* simply underscores a problem that has nationwide impact – lack of uniformity in the nature and type of evidence considered by federal courts in calculating a fee award under section 1988. Just as the individual who succeeds in defining the terms of an argument will generally win it, so too will the party that prevails in defining the type of evidence to be considered in calculating a fee award achieve victory. As one leading treatise has observed: "The elusiveness and volubility of the prevailing market rate in the relevant community make the kind and quality of evidence submitted by the fee applicant critically important to the outcome of the fee-setting process." *2 Section 1983 Litigation: Claims, Defenses and Fees* 216 (2d ed. 1991). If anything, that is putting it mildly. The type of evidence considered by a court in calculating the fee award is not simply "important," but most likely determinative.

In *Blum v. Stenson*, 465 U.S. 886, 895 n.11, this court attempted to define market rates as "rates . . . in line with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience, and reputation." (Emphasis added.) The problem has been, however, that there has been a startling lack of uniformity among the federal courts in determining what constitute "similar services" for purposes of calculating the market rate. While it is logical that hourly rates will vary from one geographic area or "market" to another throughout the country, the factors, and most specifically the evidence, that courts consider in determining the market rate should not. Yet, that is precisely what is occurring.

For example, some courts accept statistical evidence of the hourly rates charged for general legal services in a given community and thus do not confine themselves to evidence of hourly rates charged for litigation services in civil rights cases. *See Soba v. McGoey*, 761 F. Supp. 273, 278 (S.D.N.Y. 1991) (accepting survey of general litigation rates for New York City); *Hall v. Ochs*, 817 F.2d 920, 928 (1st Cir. 1987) (*American Lawyers Guide to Leading Law Firms* provides proof of market rate for general legal services in the applicable area); *Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985) (accepting *National Law Journal* survey of hourly rates for law firms in large cities). Still other courts reject statistical evidence of general rates on the ground that it is not probative. *See Wiggins v. Heckler*, 639 F. Supp. 126, 128 n.3 (E.D.N.C. 1986) (in calculating attorney's fees under Equal Access to Justice Act, local bar association survey rejected as simply showing rates charged for " 'typical' work" by area attorneys without accounting for type of work performed in the specific case); *Palmer v. Schultz*, 679 F. Supp. 68, 71 (D.D.C. 1988) (rate survey from local referral service irrelevant because it does not address rates charged for complex federal litigation). Some courts accept evidence of what other courts have found the attorneys' rate to be in other litigation,[2] a practice which seems no more logical than allowing a plaintiff to prove his damages by presenting

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[2] *See Coulter v. Tennessee*, 805 F.2d 146, 149-150 (6th Cir. 1986) (attorneys in Title VII suit limited to market rate found by district court in previous Title VII action), *cert. denied*, 482 U.S. 914 (1987); *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Cruz v. Local Union No. 3 of Int'l Bhd.*, 34 F.3d 1148, 1160 (2d Cir. 1994) (no need to submit evidence of market rates from attorneys practicing in area where district

evidence of what juries in other cases have awarded similarly injured plaintiffs. Other courts reject or discount such evidence. *See Starnes v. Hill*, 589 F. Supp. 341, 343 (W.D.N.C. 1984) ("What one judge has allowed an attorney in another case carries little weight," since "[e]ach award depends on the facts and circumstances peculiar to the individual case"), *aff'd in part, rev'd in part*, 790 F.2d 1071 (4th Cir. 1986); *Norman v. Housing Auth.*, 836 F.2d 1292, 1304-05 (11th Cir. 1988) (fee awards in other cases "irrelevant" because there is "no assurance that the attorneys in those cases possessed similar skill, experience or reputation or that the case or clients were similar to the [case] at bar"). And, as is evident here, some courts consider evidence of the hourly rates paid to defense attorneys by public entities to be probative of the market rate paid for litigation services in civil rights cases (*Andrade*, 82 F.3d at 1190), while other courts bar consideration of such evidence because defense attorneys are not in the same "legal market" as plaintiffs' attorneys. (App., p. 27a.)

The striking disparity in the evidence considered by federal courts throughout the country on the question of setting market rates for purposes of fee awards under section 1988 mandates the need for clarification by this

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court's award of attorneys fees is supported by "cases in this circuit which supported the per hour rates approved"); *Sellers v. Delgado Community College*, 839 F.2d 1132, 1141 (5th Cir. 1988) (reduction of requested rates proper in order to bring rate into line with market rate awarded by court in similar cases); *McDonald v. Armontrout*, 860 F.2d 1456, 1460-61 (8th Cir. 1988) (rates awarded in other cases provide support for rates set by district court).

Court. It is essential that the Court further define the "market" to be considered by a court in calculating a fee award. Quite simply, must attorneys compete for the same clients (the approach taken by the courts in *Trevino* and *Brooks*) in order to compete in the same "market"? Such a narrow definition of market would appear to be at odds with *Blum*'s emphasis on comparing "similar services" in order to determine the prevailing rate in a particular community.

Further, of course, the Court needs to clarify what it means by "similar services," since the Ninth Circuit's decision in *Trevino* and that of the Eleventh Circuit in *Brooks* indicate that courts are also drawing what appears to be an artificial (and unjustified) distinction between the services performed by plaintiffs' attorneys in litigating civil rights cases and those performed by private defense counsel employed by public entities. This is so despite the fact that putting aside their differing goals in such litigation, the attorneys for both sides largely confront the same tasks in terms of discovery, legal research and trial of a case.

The unpredictability of attorney's fees awarded in civil rights litigation creates a substantial problem for public entities and the courts. The day-to-day reality of modern civil rights practice is that in many cases the attorney's fees awarded to the prevailing party equal, and at times exceed, any monetary award plaintiff receives for his or her injuries, or has a more significant financial impact on a public entity than the underlying injunctive relief. *See McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1185 (11th Cir. 1993) (upholding lodestar fee of in excess of $100,000 notwithstanding monetary recovery

of only $9,000); *Morales v. City of San Rafael*, 96 F.3d 359, 360-61 (9th Cir. 1996) (damages of $17,500 could support award of $139,783 in attorney's fees); *Guam Soc'y of Obstetricians and Gynecologists v. ADA*, 100 F.3d 691, 695 (9th Cir. 1996) (attorney's fees of $552,790 awarded for striking down anti-abortion statute).

Aside from creating a significant problem in planning and budgeting for potential liability in a given case, this unpredictability hamstrings a public entity in making an informed decision concerning settling an action short of a full-blown trial. As this Court noted in *Marek v. Chesny*, 473 U.S. 1 (1985), a defendant may limit exposure to an attorney's fee award under section 1988 by making an offer of judgment under Rule 68, Federal Rules of Civil Procedure. If the Rule 68 offer is greater than the damages the plaintiff subsequently receives at trial and the amount of attorney's fees it is subsequently determined that the plaintiff's attorney had incurred as of the date of the settlement offer, then the public entity's liability for attorney's fees is cut off as of the date of the settlement offer. *Id.* at 6-7.

Thus, in order to effect a binding Rule 68 offer under *Marek*, it is essential that a public entity be able to estimate with some accuracy not simply the damages sustained by a plaintiff to date, but the attorney's fees incurred as of the date of the offer. A plaintiff's physical and emotional injuries can often be ascertained with some degree of predictability either through review of medical records or even an independent physical or psychological evaluation. The factors to be considered by any potential jury in a case are well known and well defined.

With respect to the potential attorney fee award, a public entity can similarly estimate the number of hours expended by a plaintiff's attorney in litigating the case as of the date of the offer simply by comparing it to the number of hours reasonably expended by its own counsel in defending the case. What is problematic, however, is that because the type of evidence that a district court may consider in determining the hourly market rate for the services of plaintiff's counsel is unpredictable, a defendant cannot reasonably estimate what hourly rate the plaintiff's counsel may subsequently receive from the trial court in the event the plaintiff prevails on the civil rights claim. The result is that few effective Rule 68 offers may be made in the context of civil rights litigation. That in turn means that many cases proceed to trial under circumstances where they might otherwise settle without further court intervention.

Moreover, the unpredictability with respect to the nature of evidence to be considered by a district court in calculating a market rate often leads to the very sort of protracted fee litigation that this Court has sought to avoid. This Court has repeatedly indicated that the purpose of section 1988 is not to spawn "a second major litigation." *Webb v. Board of Educ.*, 471 U.S. 234, 244 n.20 (1985) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). It has similarly decried rules or factors that "make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). However, the "anything goes" rules of evidence with respect to determining market rate gives both plaintiffs and defendants every incentive to produce the greatest

amount and broadest spectrum of evidence in a given case in order to win the battle of defining market rate for purposes of the fee award. As a result, attorney's fees motions generate enormous paperwork and, in direct proportion, consume judicial resources on an ever-growing scale.

The decision of the Ninth Circuit in this case and that of the Eleventh Circuit in *Brooks* precluding courts from considering evidence of the hourly rates paid to private attorneys who defend public entities in determining the market rate for litigating civil rights cases, is flatly contrary to the position taken by the First Circuit in *Andrade* and inconsistent with this Court's decision in *Blum*. *Trevino* and *Brooks* grossly distort the marketplace model in a manner which will invariably inflate fee awards, as they essentially confine relevant evidence in such cases to that procured from the very attorneys who would benefit from fee awards – attorneys who represent plaintiffs in civil rights litigation. The decisions of the Ninth and Eleventh Circuits simply underscore the lack of uniformity in this area and the need for this Court to clarify and refine the definition of "market" and "similar services" for purposes of calculating a fee award under section 1988. Thus, amici respectfully submit that the cross-petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the cross-petition for writ of certiorari should be granted.

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Respectfully submitted,

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